No. 87-516

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In the Supreme Court of the United States

OCTOBER TERM, 1987

MARTIN ROMAN, PETITIONER

v.

UNITED STATES OF AMERCIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that the court of appeals erred in reversing an order dismissing one count of a superseding indictment on Speedy Trial Act grounds.

On May 6, 1986, petitioner was charged in an eight count indictment returned in the United States District Court for the Southern District of New York. The indictment charged him with conspiring to distribute heroin and to possess heroin with intent to distribute it, in violation of 21 U.S.C. 846, and with distributing and possessing heroin with intent to distribute it, in violation of 21 U.S.C. 841(b)(1)(B). While the indictment was pending, various periods of time were excluded from the 70-day period within which trial must commence under the Speedy Trial Act of 1974, 18 U.S.C. 3161 *et seq.* On September 5, 1986, petitioner was charged in a superseding indictment that essentially restated the original charges and added a count charging petitioner with managing a continuing criminal enterprise engaged in the distribution of heroin, in violation of 21 U.S.C. 848. Pet. App. 3a-4a.

The district court dismissed the new count on the ground that the Speedy Trial Act time limit for trying that count commenced with the date of the arraignment on the

original indictment and that 70 days had passed without the commencement of trial. The court concluded that the continuing criminal enterprise charge must be considered the same as, or required to be joined with, the conspiracy charge in the original indictment and that the Speedy Trial Act exclusions that applied to the original indictment did not apply to the continuing criminal enterprise charge (Pet. App. 16a-26a).

The court of appeals reversed (Pet. App. 1a-13a). The court held that the 70-day speedy trial period applicable to the original indictment also applies to a superseding indictment that contains charges that are required to be joined with the original charges. However, the court also ruled that the exclusions from the 70-day period that are applicable to the original charges are also applicable to the joined charges in the superseding indictment. Accordingly, the court of appeals held that because of the exclusions applicable to the original charges, the continuing criminal enterprise charge was not barred by the Speedy Trial Act.

Petitioner contends (Pet. 5-12) that the time excluded because of the running of the speedy trial clock may not be retroactively tolled as to a count of a superseding indictment that should have been but was not contained in the original indictment. Whatever the merits of petitioner's contentions, they are not presently ripe for review by this Court. The court of appeals' decision places petitioner in precisely the same position he would have occupied if the district court had denied his motion to dismiss. If petitioner is acquitted following a trial on the merits his contentions will be moot. If, on the other hand, petitioner is convicted and his conviction is affirmed on appeal, he will then be able to present his contentions to this Court, together with any other claims he may have, in a petition for a writ of certiorari seeking review of a final judgment

against him. Accordingly, review by this Court of the court of appeals' decision would be premature at this time.[1]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

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[1] Because this case is interlocutory, we are not responding on the merits to the questions presented by the petition. We will file a response on the merits if the Court requests.

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